IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation Plaintiff, v. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual Defendants	)	No. 2:00-CV-2041-AJS

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION
OR FOR RELIEF FROM JUDGMENT

INTRODUCTION

Defendant Charles Von Bernuth ("Mr. Von Bernuth") requests relief from orders assessing him liable to Plaintiff WRS, Inc. ("WRS") and fixing the amount of the liability at $2,584,749.03. All of these events have occurred (1) by default (2) without Mr. Von Bernuth's knowledge and (3) while, as Mr. Von Bernuth has subsequently discovered, his counsel, John W. Gibson ("Attorney Gibson"), failed utterly to defend Mr. Von Bernuth and keep him advised of developments. Mr. Von Bernuth first discovered these circumstances in May of this year. He took prompt action to retain new counsel in Pittsburgh and has worked diligently with counsel to prepare the documentation necessary to seek Rule 60 relief.

In support of the Motion, Mr. Von Bernuth is presenting, *inter alia*,

- his own Affidavit regarding the circumstances by which he discovered the events recited above;
- an Affidavit of John W. Gibson wherein he candidly admits his acts of

dereliction in the handling of this matter; and

- an Affidavit from Eric Parkinson ("Mr. Parkinson"), President of Defendant Plaza Entertainment, Inc. ("Plaza"), demonstrating the existence of meritorious defenses to WRS' claim.

Notwithstanding the natural desire to have finality in litigation, Rule 60 provides an important safeguard by preserving the ability of a party, in appropriate circumstances, to have a case reopened. As explained below, case law supports providing Rule 60 relief in cases where a client has been victimized by extreme attorney dereliction such as has occurred here. Therefore, the Court should grant Rule 60 relief as requested.

RELEVANT FACTUAL BACKGROUND

(A) Counsel for Mr. Von Bernuth Failed to Represent Him

This case commenced October 13, 2000. Throughout the proceedings, Mr. Von Bernuth was represented by Attorney Gibson, a member of the bar of the Supreme Court of Pennsylvania and of this Court, as were Mr. Parkinson and Plaza. The facts concerning Attorney Gibson's extreme acts of dereliction are set forth fully in a sworn affidavit that is being filed in support of this Motion and in Mr. Von Bernuth's Affidavit. In the interest of conserving space, a detailed review of the Affidavits is not included herein and reference is made to the full text of the Affidavits. The following is a summary of the critical facts:

- At a Status Conference on March 9, 2006 Attorney Gibson advised the Court that he would file a motion for summary judgment on behalf of Mr. Von Bernuth.
- At that time, the Court determined that the parties should employ an accountant at their equal cost to review the Plaintiff's account records.
- Attorney Gibson failed to file a motion for summary judgment and failed to secure payment of the accountant's bill.
- On April 12, 2006 WRS filed a motion to have Mr. Von Bernuth defaulted for the above failures.
- Attorney Gibson failed to advise Mr. Von Bernuth of this Motion.

- On April 28, 2006, an order was entered directing Mr. Von Bernuth to show cause why he should not be defaulted.
- Attorney Gibson failed to advise Mr. Von Bernuth of this Order.
- In the absence of any response to the April 28, 2006 Order, a default was entered under Rule 55(a) (Dkt. No. 100).
- Attorney Gibson failed to advise Mr. Von Bernuth of the default.
- That Attorney Gibson failed to advise Mr. Von Bernuth of proceedings in October of 2006 to have the amount of liability established in excess of $2.5 Million.
- Attorney Gibson also failed to oppose those proceedings.
- On February 20, 2007, the Court entered an order granting judgment against Mr. Von Bernuth in the sum of $2,584,749.03.
- Attorney Gibson never informed Mr. Von Bernuth of any of these developments.
- Mr. Von Bernuth only discovered the default against him in May of 2007 from another Defendant Attorney Gibson had represented.
- Mr. Von Bernuth acted promptly to secure new counsel to bring this Motion under Rule 60.

In sum, Attorney Gibson was repeatedly and inexcusably derelict in his nonperformance of his professional duties, *see* Pennsylvania Rules of Professional Conduct 1.1, 1.3 and 1.4. Mr. Gibson acknowledges that he has "no excuse for [his] failure to properly defend clients for which [he] had entered an appearance . . . [and] for his conduct in failing to keep Mr. Von Bernuth informed and advised." (Gibson Affidavit, at 6-7.) Mr. Gibson's neglect amounted to a wholesale abandonment of Mr. von Bernuth.

(B) The Facts And Evidence Presented Show That Meritorious Defenses Exist.

To the extent that Mr. Von Bernuth may also be required to show that he has meritorious defenses to WRS's claim, he has gone to substantial effort to place on the record facts and evidence showing that such defenses exist. These facts are primarily contained in the Affidavit of Mr. Parkinson and the documentation attached thereto. The critical facts set forth in the Affidavit are summarized as follows:

- There were problems with WRS' performance under the Services Agreement virtually from the inception of the arrangement.
- WRS never accounted to Plaza or credited its account with money derived from Plaza's accounts receivable.
- Although WRS claimed that "no collections" had been received into the lock box account, Plaza's customers were in fact making payments on Plaza receivables in 1999 and 2000.
- In breach of the Agreement, Plaza received nothing from these payments, and they are not on the list of lock box payments produced by WRS.
- WRS failed to disclose or provide any records for a Mellon lock box account established in June 1999 to replace the original one.
- At the time of implementation of the second lock box, Plaza had approximately $1,045,180 in accounts receivable for collection.
- Plaza has received no payments from the $1 million plus in receivables.
- Computer errors caused WRS to generate invoices for services that either were not provided or were provided without authorization.
- WRS had possession of Plaza inventory having a wholesale value of approximately $700,000 for which WRS has not accounted.

The Court is referred to the full text of the Affidavit for the details. In sum, the Affidavit provides evidence that WRS was in breach of its obligations under the Services Agreement since at least mid-1999 and that its calculation of damages is unreliable and wrong.

ARGUMENT

I. The Interests of Justice and Third Circuit Authority Mandate That Mr. Von Bernuth Be Granted Relief

As to final judgments, Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding" for five specifically enumerated reasons and "(6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).[1] Relief under Rule 60(b)(6) is called for where final judgment has been entered as a result of gross neglect by an attorney in failing to respond to a motion for summary judgment or in allowing a default judgment to be taken. *See Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-08 (3d Cir. 1986); *Boughner v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 978-79 (3d Cir. 1978).[2]

In *Boughner*, the defendant had filed motions for summary judgment to which the plaintiffs' counsel did not respond, apparently due to his preoccupation with his election campaign, the loss of his secretary and his significant backlog of cases. The motions for summary judgment were granted as unopposed. The plaintiffs hired new counsel, who filed motions for relief from the judgments pursuant to Rule 60(b)(1) and (6). The district court denied the Rule 60 motions.

The court of appeals reversed, holding that the motion to vacate the judgments should have been granted under Rule 60(b)(6). *Boughner*, 572 F.2d at 978-79. The court explained that counsel's "egregious conduct" in failing to oppose the summary judgment motions "amounted to nothing short of leaving his clients unrepresented." *Id.* at 977. Where counsel's conduct "indicated neglect so gross that it is inexcusable" and "[t]he reasons advanced for his failure to file opposing documents in a timely fashion are unacceptable," his clients were not bound by his actions for purposes of a Rule 60 motion. *Id.* at 978. Furthermore, the Court held

[1] It is actually unclear that any final order exists in this matter. No judgment has been entered pursuant to Rule 58. Furthermore, unless a determination of finality is made under Rule 54(b), any order, "however designated," which disposes of less than all claims and all parties is not a final judgment for purposes of appeal. This Court did not make a Rule 54(b) with respect to any of its rulings. A number of claims, counterclaims and cross-claims have not been resolved, including but not limited to those transferred to California pursuant to 28 U.S.C. § 1404(a). For these reasons, Mr. von Bernuth does not believe that any final order exists but for reasons explained below the Court can and should grant relief from the von Bernuth judgment, either on reconsideration thereof or under Rule 60.

[2] Other supportive cases are *Zak v. Ultimate Dist., Inc.*, Civ. A. No. 04-4392, 2006 WL 3544581, at *2-4 (D.N.J. Dec. 8, 2006); *American Reliance Ins. Co. v. Mirabile*, Civ. A. No. 85-3225, 1986 WL 10811, at *1-3 (E.D. Pa. Sept. 29, 1986); *see also Community Dental Servs. V. Tani*, 282 F.3d 1164, 1168-71 (9th Cir. 2002); *In re Find Paper Antitrust Litig.*, 840 F.2d 188, 195 (3d Cir. 1988); *Charowsky v. Kurtz*, No. Civ. A. 98-CV-5589, 2001 WL 187337, at *7 (E.D. Pa. Feb. 23, 2001).

that "the entry of summary judgments precluded an adjudication on the merits . . . [and] thus constitute[ed] an 'extreme and unexpected hardship.'" *Id.* at 979.

The court of appeals revisited and reaffirmed this authority in *Carter*, where the plaintiff had been ordered to submit overdue answers to interrogatories by a certain date. The plaintiff's lawyer failed to file the answers within that time, and the defendant moved for dismissal of the case pursuant to Rule 37. Plaintiff's counsel did not respond to this motion, and the case was dismissed. The client did not learn of the dismissal until more than two months later, at which point he insisted that his counsel take steps to remedy the situation. Almost three months after that, plaintiff's counsel filed a motion under Rule 60 to reinstate the complaint, which was denied. Plaintiff then filed a pro se motion for reconsideration and for the dismissal of his counsel, in which he explained about his counsel's dereliction. The district court denied the motion, noting that even after the plaintiff had learned of his counsel's misdeeds, he had entrusted her with the filing of the Rule 60 motion, rather than acting on his own at that time.

The court of appeals held that this denial constituted an abuse of discretion. *See Carter*, 804 F.2d at 807-08, citing *Boughner* for the proposition that relief under Rule 60(b) is mandated where a party "suffered a default judgment because his attorney had displayed 'neglect so gross that it is inexcusable.'" *Id.* at 807 (citing *Boughner*, 572 F.2d at 978). The court explained that sanctions should be visited directly on the delinquent lawyer, rather than on the client who is not at fault, and that "dismissal must be a sanction of last, not first, resort." *Id.* The court stated that while the record was insufficient to allow the court to assess the merits of the plaintiff's claim, "the absence of his personal responsibility for his attorney's behavior" was clear. *Id.* The court also explained that an action for malpractice was not a satisfactory remedy, because of the difficulties in obtaining and collecting a judgment, and more importantly, because "public confidence in the administration of justice is weakened when a party is prevented from presenting his case because of the gross negligence of his lawyer who is, after all, an officer of the court." *Id.* at 808.

The instant case is effectively indistinguishable from *Boughner*, *Carter* and their progeny. The conduct of Attorney Gibson is, if anything, more egregious than the counsel who were found to be grossly negligent in *Boughner* and *Carter*, where he not only failed to ensure that necessary steps were taken and pleadings were filed in the litigation, but failed to respond to or inform his client of multiple motions, orders and finally the entry of judgment. (*See* Gibson Affidavit, at 4-6.) This is not a case where Attorney Gibson merely could have performed his duties better; he did not perform them at all, completely abandoning Mr. von Bernuth and leaving him effectively unrepresented. Attorney Gibson acknowledges that he has no excuse for his outrageous delinquency (*see id.* at 6-7), and it clearly constitutes exactly the kind of "neglect so gross that it is inexcusable" and calls for relief under Rule 60(b)(6).

Moreover, Mr. von Bernuth is in no way responsible for Attorney Gibson's dereliction. Mr. von Bernuth was always prompt in paying Attorney Gibson, and was ready, willing and able to pay the accountant's fees whenever called upon to do so. Mr. von Bernuth acted reasonably in awaiting further word from his attorney as to when that might be, particularly in light of their prior seven-year course of dealing, which led him to believe that long delays were the norm. Furthermore, Mr. von Bernuth acted reasonably and promptly when he did learn of the judgments against him by hiring California counsel, and ultimately retaining new Pennsylvania counsel to bring this Motion. Although Mr. von Bernuth has been hampered and delayed by the inability of Attorney Gibson to provide anything approaching a complete file on the case, he has diligently pursued relief.

Plainly, Mr. von Bernuth meets the standard for relief under Rule 60 as set forth in *Boughner* and *Carter*. Equally plainly, he meets the less stringent standard applicable to reconsideration of non-final orders, where to allow this judgment to stand would lead to a terribly "unjust result." *Swietlowich v. County of Bucks*, 610 F.2d at 1164. Whether final or not, the default judgment against Mr. von Bernuth was caused by his attorney's gross and inexcusable neglect of his professional duties through no fault of Mr. von Bernuth. The interests of justice and public confidence in the judicial system, as well as the binding authority cited above, all support a conclusion that Mr. von Bernuth should be granted relief from the judgment.

II. Mr. Von Bernuth Has Presented Evidence Showing A Meritorious Defense.

In ruling on a Rule 60 motion to vacate either a default judgment or an unopposed summary judgment that was entered as a result of attorney neglect, some cases have considered "whether the [petitioner] has a meritorious defense." *Zak v. Ultimate Dist., Inc.*, Civ. A. No. 04-4392, 2006 WL 2544581, at *3 (D.N.J. Dec. 8, 2006); *American Reliance Ins. Co. v. Mirabile*, Civ. A. No. 85-3225, 1986 WL 10811, at *2-3 (E.D. Pa. Sept. 29, 1986).[3] In this case, the evidence presented by Mr. von Bernuth shows that meritorious defenses exist.[4]

In this action, WRS alleged that Plaza breached a contractual obligation to make payments under the Services Agreement and the various invoices submitted by WRS to Plaza. WRS sought to hold Mr. von Bernuth liable for Plaza's alleged contractual obligation on the basis that he allegedly guaranteed Plaza's performance in the Services Agreement.

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[3] These decisions are, at a minimum, in tension with the Third Circuit's decision in *Carter*, in which the court held that the district court's denial of relief under Rule 60 constituted an abuse of discretion notwithstanding the fact that the record was insufficient to allow the court to assess the merits of the plaintiff's claim. *See Carter*, 804 F.2d at 807. Regardless, as shown below Mr. von Bernuth has presented evidence of meritorious defenses.

[4] The cases cited above have also considered two other factors: “whether the [prevailing party] will be prejudiced if the default is lifted” and “whether the default was the result of the [petitioner's] culpable conduct." *Zak v. Ultimate Dist., Inc.*, Civ. A. No. 04-4392, 2006 WL 2544581, at *3 (D.N.J. Dec. 8, 2006). In this case, these considerations are met. Neither the fact that a plaintiff will have to try the case on the merits if relief is granted, nor delay in a plaintiff's possible recovery constitute the kind of prejudice that precludes relief. *See Feliciano v. Reliant Tooling Co.*, 691 F.2d 653, 656-57 (1982). Moreover and as discussed above, the entry of judgment against Mr. von Bernuth was the result of his attorney's gross and inexcusable neglect for which Mr. von Bernuth was in no way responsible.

While the cases provide no explicit definition of what constitutes a meritorious defense in the context of a Rule 60 motion, the most logical standard to apply is the same one that applies on summary judgment. Thus, the Court should assume that the facts presented by Mr. von Bernuth's witnesses are true and correct. The Court should then consider whether the evidence thus presented could support a jury finding in favor of the moving party. If so, the case cannot be resolved without a trial and a meritorious defense exists.

In this case, the evidence supplied in the Parkinson Affidavit, and the documentation attached thereto, would support a jury finding that WRS was itself in material breach of the Services Agreement and that WRS's accountings are unreliable and inaccurate.

With respect to WRS's acts of breach, it is established law that "[i]f a breach constitutes a material failure of performance, then the non-breaching party is discharged from all liability under the contract." *E.g., Widmer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 467 (Pa. Super. 2003), citing, *Oak Ridge Const. Co. v. Tolley*, 351 Pa.Super. 32, 504 A.2d 1343 (1985). In determining whether a breach is material so as to discharge the non-breaching party, a court considers the factors, including the extent of the injury to the non breaching party, set forth in Restatement (Second) of Contracts § 241 (1981). *Id.* at 468.

Here, the affidavit of Mr. Parkinson provides evidence that beginning with the creation of a second lock box account at Mellon Financial Services in or about June 1999, WRS failed to make payments due to Plaza under the Services Agreement in connection with the collection of Plaza's accounts receivable, that WRS did not account to Plaza for the receivables it did collect, that Plaza has never accounted for $700,000 of Plaza's inventory that was in WRS's possession and that WRS failed to list in its records all payments made on Plaza's receivables.

Mr. Parkinson has obtained direct evidence of a Plaza customer which made two payments totaling more than $21,000 on its Plaza account in July and September of 1999. Neither of these payments is recorded in the records submitted by WRS in support of the judgment entered in its favor in this case. Mr. Parkinson attests that other purchasers of Plaza products have also reported making payments which do not appear in WRS's accounting. These include Baker & Taylor Video, Musicland Group and Major Video Concepts.

Beyond the failure to record all payments received, examination of the WRS accounting attached as Exhibit 1 to the Napor Affidavit, (Dkt. No. 115) shows that on each payment that WRS ***did show*** going into the National Bank of Canada account, it systematically gave Plaza credit for only 50% of such payment. Thus, for example, the handwritten accounting of lock box receipts that WRS produced in discovery shows that on February 1, 2000 a $2,876.64 payment was made into the lock box. (See Excerpts of Discovery Materials filed herewith). Exhibit 1 to the Napor Affidavit contains an entry on that same date showing that only $1,438.32 of that payment (one-half) was credited to Plaza' account. Inspection of the records shows that the pattern of giving half credit for payments was consistent.

In his Affidavit, Mr. Parkinson says that WRS kept 100% of these collections. Mr. Parkinson has produced contemporaneous correspondence he was having with WRS in February of 2000, the time of the illustrative payment cited above, which documents that for at least 5 to 6 months prior to that he had been given the consistent report that "no collections" had occurred into the lock box. Thus, WRS kept 100% of payments (at least after mid-1999) but its judgment is based on account records that give Plaza only 50% credit for those payments.

Furthermore, in discovery WRS was asked to identify and provide records for **all lock box accounts** that ever existed under the Services Agreement. In response, WRS identified only the National Bank of Canada lock box and produced records for only that account. (See Excerpts of Discovery Materials). However, documents provided by Mr. Parkinson show that a second lock box account was created at Mellon to replace the original one. (See Exhibits E and F to Parkinson Affidavit). In letters from the time, Mr. Parkinson directed Plaza customers to make payments into the Mellon account. The second account was not disclosed by WRS and records for that account were not produced.

In addition to all of these problems, the man who provided the Affidavit attesting to the accuracy and reliability of WRS's account records was Jack Napor. In his deposition, Mr. Napor was unable to provide the very authenticating information to which he so glibly attests in his Affidavit. Under the cases, the Napor Affidavit is properly disregarded as a sham affidavit. When an affiant "was carefully questioned on [an] issue, had access to the relevant information at that time, and provided no satisfactory explanation for the later contradiction," his subsequent affidavit contradicting his prior testimony does not create a genuine issue of material fact and is properly disregarded. *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705-06 (3d Cir. 1988). This is particularly so when the issue was of "considerable importance" in the case and the subject of repeated questioning. *See id.* at 705. "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 706. Accordingly, where at deposition the affiant testified he did not know something, a court properly disregards a later affidavit that contradicts this testimony. *See Overall v. University of Pa.*, 412 F.3d 492, 495 & n.2 (3d Cir. 2005); *Mach Mold Inc. v. Clover Assocs.*, 383 F. Supp. 2d 1015, 1037-38 (N.D. Ill. 2005).

In his Affidavit, Mr. Napor states that based upon his examination of the records and his personal knowledge, a document establishing Plaza's indebtedness at $1,324,841.61 is accurate and accounts for all payments WRS received. (Napor Affidavit, Dkt. No. 115, at ¶¶ 5-6 & Exhibit 1.) But at deposition, at which he appeared as an individual and also as WRS's corporate designee, Mr. Napor:

- Could not testify as to the status of Plaza's account in July of 1998 even after looking through a box of documents (Excerpts of Discovery Materials, Napor Depo., at 77-78);
- Was unable to provide any documentation concerning the status of Plaza's account at August 31, 1998, the date the Services Agreement, *id.* at 108-12;
- Stated that there were a "lot of people who have been through it [WRS' documentation]", in an effort to account for its disorganization, *id.* at 111;
- Testified repeatedly that many of WRS' records were missing, *id.* at 54-57, 106-08, 111;
- Testified, upon renewing the deposition after a two month break to obtain more information and documents, that he still could not provide critical information to substantiate WRS' claim against Plaza, *id.* at 138, 149-50.

Through his entire deposition, although the subject was addressed at length in both November and again in January, he was never able to quantify Plaza's debt as of the date of the Services Agreement. Despite this, in his Affidavit, Mr. Napor states based upon his personal knowledge and his review of the record, that the records kept by WRS account for all sales made by WRS to Plaza, all payments made by Plaza to WRS, and that Plaza owes WRS $1,324,841.61. (Napor Affidavit, Dkt. No. 115, ¶¶ 5-6 & Exhibit 1.)

Significantly, in light of Mr. Parkinson's evidence of payments on Plaza receivables that were made to WRS but never recorded, Mr. Napor had no understanding as to the amount of money that was deposited into the lock box account. (Napor Depo., at 147.) Yet in his Affidavit, he states, based upon his personal knowledge, that no payments were received on the Plaza Entertainment account after August 3, 2001, and that records kept by WRS account for all payments WRS received. (Napor Affidavit, Dkt. No. 115, ¶¶ 5-8.) This is despite the fact that at his deposition, he was not aware even of substantial payments made by Plaza and reflected in WRS's own documents. (Napor Depo., at 200-202, 225-26, 228-29.)

Finally, at his deposition, Mr. Napor testified that beginning on January 1, 2000, WRS switched over to a new accounting system and software known as Dovenet, which created serious problems and "generated invoices that contained frequent errors, one of which used the ordered item's product numbers as the selling prices if the order entry operator originally entered the order too fast . . .." *Id.* at 226-27. Despite this, in his Affidavit, Mr. Napor authenticated the WRS's records as accurately reflecting all sales to Plaza, notwithstanding the fact that some of these sales are reflected in invoices generated by the Dovenet system. (Napor Affidavit, Dkt. No. 115, ¶¶ 5-6 & Exhibit 1.)

In sum, the averments in Mr. Napor's Affidavit as to the accuracy of WRS's records cannot be reconciled with his prior testimony on these issues, which was nothing if not extensive. Moreover, Mr. Napor was testifying as a corporate designee and had a duty under Rule 30(b)(6) to testify to all matters "reasonably available" to WRS. Thus, to the extent information was available in WRS's records, he was required to provide that information at his deposition. Despite being granted a two-month adjournment during which apprise himself of the critical facts, he could not provide them.[5]

Other defenses to WRS's claim will be presented but only one will be mentioned

[5] Without the Napor Affidavit, the Schneider Downs report is clearly insufficient to meet Plaintiff's burden of proving its damages with reasonable certainty in this case. Schneider Downs did not audit WRS's records. Although Schneider Downs vetted the WRS documents authenticated by Mr. Napor for "mathematical accuracy," it did not determine whether invoices accurately reflected sales. (Excerpts of Discovery Materials, Schneider Downs Report, at 3.) Similarly, Schneider Downs made no attempt to determine whether the Account Receivable balance accurately reflected all payments made by Plaza, although they did note that WRS was receiving payments from Plaza that were not reflected on the bank account statements relating to the lock box. *See id.*

here in deference to the Court's limitation on Brief length.[6] Where a creditor has knowledge that a surety relationship exists between parties liable on the obligation, it has a duty to act with "due consideration of the rights of the surety." *See, e.g., First Nat'l Bank & Trust Co. v. Stolar*, 197 A. 499, 502 (Pa. Super. 1938; *accord Keystone Bank v. Flooring Specialists, Inc.*, 518 A.2d 1179, 1184-85 (Pa. 1987). A surety is therefore discharged when the creditor, without consent of the surety, "committed some act which prejudiced the surety's rights or increased the risk of the surety's undertaking." *Keystone Bank v. Flooring Specialists, Inc.*, 518 A.2d at 1185.

In the instant case, WRS violated its duty to Mr. von Bernuth in multiple ways, thereby significantly increasing his risk. Under the Services Agreement, WRS undertook to perform administrative services for Plaza. Yet, WRS admits that for a portion of the time when it was generating Plaza's invoices and attempting to collect its accounts receivable, WRS was having serious problems with its software system. (Napor Depo., at 226-27, 229-30.) Mr. Parkinson's Affidavit and the supporting documents show that he was making contemporaneous complaints that these computer errors were artificially inflating Plaza's alleged obligation.

Moreover the ballooning of Plaza's alleged debt to WRS under the Services Agreement could not be justified even to the extent that it did not stem from computer error. The Services Agreement stated that invoices for new duplication work by WRS were to be "paid in full within 60 days of the date of such invoice." The Agreement went on to provide that **"in no event shall any New Invoice remain unpaid for more than 89 days after the date of such New Invoice**." (Exhibit B to Parkinson Affidavit, at 3 (emphasis added).) This provision was obviously and unambiguously intended to limit additional indebtedness that Plaza would be permitted to incur and thus to limit the exposure of the individual guarantors.

[6] For example, WRS never gave Mr. Von Bernuth notice that it was accepting his guaranty, and it is therefore unenforceable against him. *Deeter v. Dull Corp.*, 617 A.2d 336, 341 (Pa. Super. 1992); *accord Acme Mfg. Co. v. Reed*, 47 A. 205, 207 (1900); *see also Fasco v. Modernage, Inc.*, 311 F. Supp. 161, 164 (W.D. Pa. 1970).

Despite this, according to WRS, Plaza's debt was allowed to balloon from $685,379.88 as of August 31, 1998 to the alleged $1,324,841.61 that WRS claims it was owed as of August 3, 2001. This kind of explosion in Plaza's debt is the very situation that the parties sought to preclude by expressly requiring that new invoices be paid within ninety days. Under no reading of the Services Agreement can Mr. von Bernuth be held liable for debts incurred after January 14, 1999, when invoices from October 14, 1998 went unpaid for ninety days. That event should have been the end of any further extension of credit by WRS to Plaza.

CONCLUSION

For the foregoing reasons, Defendant Charles von Bernuth respectfully requests that this Court enter an Order vacating the judgment against Mr. von Bernuth and thereby affording Mr. von Bernuth the opportunity to defend on the merits.

Respectfully submitted,

/s/ James R. Walker

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